RHB Bank Bhd v Mohd Rokhani bin Abu Kassim (No 2)

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S2-22-256 OF 1993
KAMALANATHAN RATNAM J
22 OCTOBER 1998

Contract *— Novation — Plaintiff granted loan facility to defendant to purchase flat — Plaintiff gave consent to defendant to sell flat to DW1 and granted loan to DW1 — Plaintiff subsequently refused to consent and had cancelled loan — Whether there exist novation of contract — Contracts Act 1950 s 63*

In 1986, the defendant entered into a sale and purchase agreement to purchase a flat ('the old unit') with the Datuk Bandar at an agreed price of RM39,500. To finance the purchase, the defendant applied for a housing loan from the plaintiff which was later granted upon execution of the loan agreement and deed of assignment (which was the security for the loan). A fire incident occured, whereby the victims of the incident were located in two apartment blocks which included the old unit. The Datuk Bandar then offered the defendant a new unit to replace of the old unit, in which the defendant accepted. Sometime in 1988, the defendant sought the plaintiff's consent to sell the new unit to DW1 as he could not repay the loan. The plaintiff consented the defendant's request and granted DW1 a housing loan to redeem the old unit. In June 1990, the defendant executed a fresh sale and purchase agreement with the Datuk Bandar for the new unit in substitution of the old unit.

The plaintiff contended that it had, by a letter to the defendant and a copy to DW1, dated in March 1991, refused to give consent to the transfer of the new unit to DW1 and cancelled the housing loan granted to her. As a result of this, the plaintiff demanded from the defendant, the oustanding sum together with interest under the housing loan granted to him, together with various other declaratory relief. The defendant, on the other hand, denied owing the said sum as he had executed all the relevant documents to transfer the new unit to DW1. The issue was whether there is a novation of the new loan agreement with the consent of the plaintiff.

Held, dismissing the claim with costs:

The court accepted evidence adduced by the defendant regarding the existence of a novation of contract. Pursuant to s 63 of the Contracts Act 1950, the parties concerned had evinced a clear intention to novate the earlier contract by entering into a fresh contract between DW1 and the plaintiff. The claim by the plaintiff as against the defendant ought to be dismissed with costs (see pp 268C, 269G).

[Bahasa Malaysia summary

Pada tahun 1986, defendan telah mengikat suatu perjanjian jual beli untuk sebuah flat ('unit lama') dengan Datuk Bandar pada harga yang

dipersetujui iaitu RM39,500. Bagi membiayai pembelian itu, defendan telah memohon pinjaman perumahan daripada plaintif dan permohonannya itu diluluskan setelah pelaksanaan perjanjian pinjaman dan suratikatan penyerahakan (cagaran bagi pinjaman tersebut). Satu insiden kebakaran telah berlaku, di mana mangsa-mangsa insiden tersebut telah ditempatkan di dua blok pangsapuri, termasuklah unit lama itu. Datuk Bandar kemudiannya menawarkan kepada defendan sebuah unit baru bagi menggantikan unit lama, dan defendan telah menerimanya. Sekitar tahun 1988, defendan telah meminta kebenaran plaintif untuk menjual unit baru itu kepada DW1 kerana dia tidak mempu membayar kembali pinjaman perumahannya itu. Plaintif membenarkan permintaan defendan dan memberikan pinjaman perumahan kepada DW1 bagi menebus unit lama itu. Pada Jun 1990, defendan telah melaksanakan suatu perjanjian jual beli yang baru dengan Datuk Bandar untuk unit baru itu sebagai ganti kepada unit yang lama.

Plaintif menegaskan bahawa ia telah, melalui sepucuk surat kepada defendan dan satu salinan kepada DW1 bertarikh Mac 1991, enggan memberi kebenaran kepada pindah milik unit baru itu kepada DW1 dan telah membatalkan pinjaman perumahan yang diberikan kepadanya. Dengan itu, plaintif telah menuntut daripada defendan, jumlah yang masih belum dibayar dan bunga, bagi pinjaman perumahan yang telah diberikan kepadanya itu bersama dengan beberapa perisytiharan relief yang lain. Defendan pula telah menafikan jumlah yang terhutang itu kerana dia telah melaksanakan semua dokumen-dokumen yang perlu bagi memindahmilik unit baru itu kepada DW1. Isu adalah sama ada terdapatnya suatu novasi pada perjanjian pinjaman yang baru itu dengan kebenaran plaintif.

Diputuskan, menolak tuntutan dengan kos:

Mahkamah telah menerima bukti-bukti yang diketengahkan oleh defendan berkenaan dengan kewujudan satu novasi kontrak. Sejajar dengan s 63 Akta Kontrak 1950, kedua belah pihak telah memperlihatkan dengan jelas niat untuk menovasikan kontrak yang awal dengan memasuki suatu kontrak yang baru di antara DW1 dan plaintif. Tuntutan plaintif terhadap defendan haruslah ditolak dengan kos (lihat ms 268C, 269G).]

Notes

For cases on novation of contract, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 2631–2638.

Legislation referred to

Contracts Act 1950 s 63

Karlos Israphil bin Bendlin (*Ariff & Co*) for the plaintiff. A
Anthony Gomez (*Moghan & Co*) for the defendant.

Cur Adv Vult

Kamalanathan Ratnam J:

B

Facts

On 2 June 1986, the defendant entered into a sale and purchase agreement with the Datuk Bandar to purchase a unit of flat known as Unit No 5, Tingkat 1, Block 28 Kawasan Gombak 2, Selangor ('the old unit') at an agreed price of RM39,500. The defendant then applied to the plaintiff for C a housing loan to finance the payment for the old unit. The plaintiff agreed and granted a loan amounting to RM35,550 after a loan agreement and a deed of assignment were executed on 4 November 1986 by both parties. The deed of assignment was to be the security for the loan. Pursuant to the sale and purchase agreement it was, inter alia, agreed that the defendant was merely a licensee of the plaintiff (cl 14) and that the defendant shall not be D discharged of his liability unless the plaintiff otherwise agrees (cl 21). Under the deed of assignment, the defendant absolutely assigned to the plaintiff all his rights, title and interest in the old unit under the sale and purchaser agreement. This was consented to by the Datuk Bandar, with the plaintiff being entitled to possession and/or to the right to sell the old unit in the event of default of payment. E

A fire occurred in Kampung Datuk Keramat and the Datuk Bandar decided to house the victims of the fire tragedy in two of the apartment blocks. The defendant's old unit was one of the units affected. By a letter dated 16 February 1987, the Datuk Bandar offered the defendant a new apartment Unit 07, Tingkat 1, Block 26 ('the new unit') in place of the old F unit. The defendant accepted this change by signing on the said letter, his acceptance. Similar offers were also made by the Datuk Bandar to other purchasers whose apartments were affected by the relocation of the fire victims.

In the meantime, sometime in 1988, the defendant approached the G plaintiff and sought its consent to sell the new unit to one Hajjah Fatimah bte Saad ('DW2'), as he the defendant was unemployed at the material time and could not repay the loan granted to him by the plaintiff. The plaintiff consented to the defendant's request and upon application by DW2, the plaintiff agreed to grant to her a housing loan of RM35,500 together with interest at 8.5% pa calculated on monthly rests, to redeem the old unit. H

On 20 June 1990, the defendant executed a fresh sale and purchase agreement with the Datuk Bandar for the new unit in substitution of the old unit.

The plaintiff's case I

It is the plaintiff's case that it had, by a letter dated 29 March 1991, and addressed to the defendant with copy to DW2, refused to give the consent

A to the transfer of the new unit to the latter, and cancelled the housing loan facility which it had approved to enable DW2 to redeem the old unit and settle the defendant's outstanding housing loan. The plaintiff demanded from the defendant the outstanding sum of RM51,550 together with interest as at 31 December 1992 under the housing loan granted to him at 10% pa together with various other declaratory reliefs.

B

Case for the defence

The defendant contends that he had executed: (1) the deed of release of assignment of the old unit; (2) a new loan agreement; and (3) a deed of assignment of the new unit at the office of the plaintiff's solicitors, namely C Manjit Singh Sachdev, Mohammad Radzi & Partners, and had signed all the said documents that were handed to him by the plaintiff's solicitors' clerk, one Marvin. He further contended that he and DW2 had signed the documents of transfer at the said office and that DW2's husband, Haji Rosli ('DW3'), was the guarantor for the said loan. In respect of the alleged claim D for RM51,550.50, he maintained that DW2's approved loan of RM35,550 was used to set off the same and that a further sum of RM6,000 was placed with the plaintiff in its fixed deposit account. He also maintained that he had signed all relevant documents and had transferred the new unit to DW2 in the plaintiff's solicitors' office. He therefore denied owing the said sum.

E *Court's findings*

The defendant, DW2 and her husband, DW3, testified that they had attended the office of the plaintiff's solicitors, Manjit Singh Sachdev, Mohammad Radzi & Partners and had executed the deed of release and reassignment and the new agreement in the presence of Marvin Chin, the F clerk in charge of the said firm of solicitors. The defendant also testified that he had been released of his loan by DW2 who had executed fresh loan documents and that her husband had signed the letter of guarantee and, that the legal and stamping fees of RM974.50 was paid by DW2. He was also assured by both the plaintiff and its solicitors, through Marvin Chin, that the Datuk Bandar had agreed to the assignment to DW2.

G

It is significant to note that all three defence witnesses contended that they had dealt with this illusive Marvin Chin. In para 6 of the defence, the defendant had specifically pleaded executing the documents before this clerk. Yet the plaintiff never rebutted this evidence by calling the clerk. The plaintiff submitted that since it was the case for the defendant that he had H signed the documents in the presence of this clerk, it was his duty to call Marvin Chin. I do not agree. This is not a case where the defence has taken the plaintiff by surprise. Sufficient notice has been given. It is not that the plaintiff had denied the existence of this Marvin Chin. Mr Manjit Singh who gave evidence made no such suggestion. He merely said that based on the records and from his file, there are no such documents as alleged by the I defence. To my mind that is no answer. I find as a fact that Marvin Chin did exist. Once that is accepted, there are no cogent reasons for me to reject the evidence of the three witnesses who testified under oath that all relevant

documents were signed before this Marvin Chin. Marvin Chin ought to have been called by the plaintiff or at least his absence ought to have been sufficiently and satisfactorily explained by the plaintiff. A

In fact in the pleadings, the plaintiff has admitted that it had, in writing, given its consent for the defendant to substitute the new unit, for the old.

Having seen and heard the evidence of the witnesses, I accept the evidence of the three defence witnesses. I accept that all three had in fact attended the office of Manjit Singh Sachdev, Mohammad Radzi & Partners, and executed all the relevant documents before their clerk, Marvin Chin. I also accept the defendant's explanation that because he was unable to pay the monthly instalments, he had approached DW2 to take over the new unit. I have no reason to reject his explanation that he and DW2 had signed the documents of transfer at the solicitors' office and that DW3 signed as guarantor. B C

It is not too difficult to accept the submission that there was a novation of the new loan agreement with the consent of the plaintiff. Facts which indicate this are that the defendant had consented to accept the new unit in substitution for the old unit with the Datuk Bandar. The letter of offer containing the terms of the loan from the plaintiff to DW2 dated 24 September 1988 was accepted by her. It is surprising that the letter dated 29 March 1991 from the plaintiff cancelling the loan to DW2 was addressed to the defendant and not to DW2. Even though a copy of this letter was sent to DW2, there is no evidence before me that she had indeed received this letter. It is only axiomatic that in the event of a cancellation of a loan, the recipient of the loan be notified first. In any case, DW2's solicitors' letter dated 15 October 1991, addressed to Manjit Singh Sachdev, Mohammad Radzi & Partners, confirming that she had called at their office together with the present defendant and DW3 to execute the agreement to transfer the new unit from the defendant to DW2, although received by the said solicitors, was never replied to. D E F

If as contended by the plaintiff that the defendant, DW2 and DW3 had never attended its solicitors' office, nor executed any documents, then it is only proper that the said letter dated 15 October 1991 ought to have been replied, denying the contents therein. G

What is significant is that in the course of the trial, the defendant produced a letter dated 19 January 1989 from the plaintiff to Manjit Singh Sachdev, Mohammad Radzi & Partners, containing instructions regarding DW2, and directing the said solicitors to prepare fresh legal assignment, loan agreement and charge in escrow over the new unit together with a personal guarantee to be signed by DW3. This letter was admitted by consent. To my mind, this letter clearly supports the case of the defence. Another letter dated 11 May 1989 from the said solicitors to DW2, requested her to pay the sum of RM974.50, being their legal fees and disbursements. This letter too was admitted by consent. The most telling letter was an undated letter from DW2 to the plaintiff and copied to their solicitors. This letter refers to her meeting with Marvin Chin, and to the fact that she had made some payments and her refusal to make further payments H I

because there has been no change of name from the defendant to her. Again this letter was never replied both by the bank and its solicitors. The defendant also tendered to court a letter from the plaintiff's solicitors to the plaintiff, to uplift DW2's fixed deposit account for RM6,046.32, to part settle the monthly instalments to service the housing loan. I accept this evidence as completing the case for the defendant of the existence of a novation of the contract. Another set of documents tendered by the defendant and admitted by counsel are the invoice receipts of payments made by DW2 towards part-payment of the redemption sum due from the defendant to the plaintiff. I can't see any reason for the plaintiff to have accepted these payments if not for the fact of the novation to the contract.

I reject the plaintiff's contention that the reason for cancelling the loan agreement with DW2 was because she had refused to pay the interest. In any case, even if this was so, she ought to have been sued on the fresh contract; instead I find that the wrong party has been sued.

I find as a fact, that DW2 had indeed taken over the loan. She had indeed paid the balance of the redemption sum amounting to RM6,100.17 in cash, and RM6,046.32 from her fixed deposit account. The defendant had executed all relevant documents in the presence of Marvin Chin and had been released of the loan. I also find that DW2 had indeed executed a fresh loan agreement and that her husband, DW3, had signed as guarantor. I also find that DW2 had indeed paid the legal fees and disbursements amounting to RM974.50.

I am satisfied that pursuant to s 63 of the Contracts Act 1950 which reads:

> Effect of novation, rescission and alteration of contract
>
> If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.

The parties concerned had evinced a clear intention to novate the earlier contract by entering into a fresh contract between DW2 and the plaintiff. The plaintiff has clearly accepted the performance of the terms by DW2. I am also satisfied that this claim by the plaintiff as against the defendant ought to be dismissed with costs.

Claim dismissed with costs.

Reported by Mohd Rizal Abidin